IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.

WRIT PETITION NO.481 OF 2001

Sedco Forex International Drilling Inc.,
a company incorporated under the law of
Panama and having an office atr 501-505,
5th floor, Balarama Building, Bandra-Kurla
Complex, Bandra (East) Mumbai-400 051. .. Petitioner

v/s.

1. The Union of India

2. The Assistant Commissioner of Customs,
SIIB (Import), having his office at
10th floor Annexe, New Customs House,
Ballard Estate, Mumbai-400 001.

3. Citibank, N.A., a banking company having
branch at Bombay Mutual Building,
Mezzanine Floor, 293, Dr.D.N.Road,
Mumbai-400 001. .. Respondents

Mr.Atul Setalvad, Senior Counsel with Mr.D.B.Shroff, Senior Counsel and Mr.Shiraj Rustamjee & Ms.Farzana Karbhari i/by M/s.Crawford Bayley & Co. for the petitioner.

Mr.S.M.Shah with Mr.M.I.Sethna, Senior Counsel for the respondent Nos.1 and 2.

Mr.D.V.Dolas i/by M/s.Pardiwala & Co. for the respondent No.3.

CORAM : R.M. LODHA &
J.P.DEVADHAR, JJ.

DATED : 22ND MARCH, 2006.

ORAL JUDGMENT (Per R.M.Lodha, J.)

The petitioner has approached this court under Article 226 of the Constitution of India praying for the following reliefs:-

> "(i) Directing Respondent Nos.1 and 2 to forthwith cancel and/or withdraw the letter dated 26th February, 2001 (Exhibit `H' hereto);
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> (ii) Directing Respondent Nos.1 and 2 to restrain from invoking the Bank Guarantee dated 20th April, 2000 (Exhibit `C' hereto) for any amount in excess of Rs.23,97,94,320/-;
>
> (iii) Directing Respondent Nos.1 and 2 to refrain from in any other manner attempting to recover any amount in excess of Rs.23,97,94,320/- from the petitioner.
>
> ....."

2. The controversy arises in the circumstances that we may briefly indicate hereinafter:

(i) The petitioner claims to own a mobile offshore drilling rig called the Trident II (for short "the said rig"). The said rig was first brought offshore India in April, 1988 for use under a drilling contract with the Oil & Natural Gas Corporation Limited.

(ii) On 8th July, 1999, the Commissioner of Customs (Imports) issued a notice under section 124 of the Customs Act, 1962 calling upon the petitioner to show cause and explain as to (a) why the said rig valued at Rs.210,82,74,000/- should not be confiscated under section 111(a), (d), (f), (g) and (h) of the Customs Act, 1962; (b) why penalty be not imposed upon them under section 112(a) and (b) of the Customs Act, 1962.

(iii) The show-cause notice was also issued to various other parties viz. M/s.Oil and National Gas Corporation Ltd., M/s.Great Eastern Shipping Co.Ltd., M/s.Varun Shipping Co.Ltd., M/s.J.M.Baxi & Co., M/s.Lexite.com Limited and Remy Baizan.

(iv) As per the allegation in the show-cause notice, the said rig had been illegally imported on its first entry into India in 1988 as no bill of entry was filed at this time. The said rig was located from April, 1988 to December, 1988 at 33 locations. The movement of the said Rig to designated locations amounted to import each time and necessitated the filing of bill of entry and payment of duty. The value of the rig as per the customs department in the year 1988 for customs assessment purposes was US$ 49 million.

(v) The Commissioner of Customs (Import), pursuant to the show cause notice, passed the order in original on 27th January, 2000 whereby he ordered confiscation of the said rig valued at Rs.210,82,74,000/- under section 111(d), (f), (g) and (h) of the Customs Act, 1962. In that order, the petitioner was given an option to clear the said rig on payment of redemption fine of Rs.15,00,00,000/- in lieu of confiscation. It was clarified that the fine in lieu of confiscation of rig shall be in addition to the duty and charges payable in respect of the said rig under

section 125(2) of the Customs Act. The penalty of Rs.5,00,00,000/- was also imposed on the petitioner under section 112(a) and (b) of the Customs Act, 1962.

(vi) The petitioner preferred an appeal from the order in original dated 27th January, 2002 to the Customs and Excise Gold (Control) Appellate Tribunal (for short `the Tribunal'). In the appeal, the petitioner made an application for stay of operation of the order in original and waiver of principal deposit of penalty. By the order dated 27th March, 2000, the Tribunal waived the deposit of the balance amount of penalty on a deposit of Rs.3,00,00,000/- and stayed the operation of the order dated 27th January, 2000 on the petitioner furnishing a bond and bank guarantee in the sum of Rs.50,00,00,000/-.

(vii) The petitioner in compliance of the interim order dated 27th March, 2000, deposited Rs.3,00,00,000/- on 31st March, 2000 and also furnished bond and the bank guarantee in the sum of s.50,00,00,000/- on 20th April, 2000.

(viii) By its order dated 2nd February, 2000, the Tribunal disposed of the appeal of the petitioner alongwith few other appeals. The Tribunal in its order held that the rig was liable to confiscation for the initial import made in the year 1988. It was held that the value of the rig for the purpose of levy of duty has to be as in the year 1988 since the confiscation of the rig is for

the initial import made in the year 1988. The Tribunal noticed that according to the petitioner (appellant therein), the value of the rig at the time in the year 1988 for the purposes of levy of duty was US$ 13 million. Since the petitioner claimed drawback of the duty under section 74 of the Act, the Tribunal observed that the duty liability shall be worked out after taking the drawback, if any. The Tribunal held that the rig having been imported in the year 1988, it was no more imported goods thereafter and no documentation was required for further movement in designated areas. The redemption fine and penalty was reduced to Rs.25,00,000/- and Rs.5,00,00,000/- respectively. The Tribunal clarified that the rate of duty applicable would be that under section 15(1)(c) of the Customs Act that is the duty prevailing on the date of payment of duty.

(ix) On 15th February, 2001, the petitioner sent a communication to the Customs Department that it was exercising the right of redemption of the said rig and requested the Deputy Commissioner to appropriate the redemption fine and penalty aggregating to Rs.30,00,000/- from the deposit of Rs.3,00,00,000/-. Which was made pursuant to the interim order passed by the Tribunal.

(x) By further letter dated 20th February, 2001, the petitioner pointed out to the concerned authority that as per the order of the Tribunal, the duty payable works out to be

Rs.26,67,94,320/- by adopting the current rate of duty of 44.04% and exchange rate of Rs.46.60 per US dollar. The petitioner requested that the remaining amount of Rs.2.7 crores be appropriated towards the duty payable and out of the bank guarantee of Rs.50,00,00,000/-. In its letter, the petitioner reserved its right to claim refund/drawback in accordance with the order of the Tribunal.

(xi) By the communication dated 26th February, 2001, the petitioner was informed by the City Bank NA (respondent No.3) that the Assistant Commissioner of Customs, SIIB (Import) (respondent No.2) has sought invocation of the bank guarantee dated 20th April, 2000 for the full amount of Rs.50,00,00,000/-. According to the Assistant Commissioner of Customs, as per the order of the Tribunal, the duty liability for import of rig several times and redemption fine provisionally works out to be more than Rs.100 crores and, therefore, by his letter (Exhibit `H'), he requested the bank to issue a demand draft of equivalent amount of bank guarantee in favour of the Commissioner of Customs (Import).

(xii) The petitioner is said to have addressed a letter on 26th February, 2001 itself to the Assistant Commissioner of Customs pointing out that the invocation of the guarantee for the full amount of Rs.50,00,00,000/- is a breach of the order passed by the Tribunal on 2.2.2001.

3. It is not in dispute that the order of the Tribunal was challenged by the petitioner as well as the revenue before the Supreme Court. Both the parties agree that they were unsuccessful before the Supreme Court and that the order of the Tribunal attained finality.

4. It is also not in dispute before us that the final assessment of the duty is yet to be done by the assessing authority and that the bill of entry has been furnished by the petitioner to the assessing officer.

5. Mr.Atul Setalvad, the senior counsel for the petitioner made the statement that the petitioner was not desirous in claiming the drawback as was earlier canvassed before the Tribunal.

6. It is one of those cases where in opposition to the writ petition, many affidavits have been filed by one party (customs department). The first affidavit is of Mr.A.K. Singh, filed on 9th March, 2001. The second affidavit is again by Mr.A.K.Singh, Assistant Commissioner of Customs, SIIB (Import), filed on 16th April, 2001. The third affidavit is of Mr.B.G.Koli, Deputy Commissioner of Customs, SIIB (Import), filed on 12th July, 2005. The fourth affidavit is of Mr.G.S.Arekar, Deputy Commissioner of Customs, SIIB, filed on 5th October, 2005. The

fifth affidavit is again of Mr.G.S.Arekar. The last and the sixth affidavit is of Mr.S.S.Bhadoria, Assistant Commissioner of Customs, SIIB, filed on 19th October, 2005.

7. We do not deem it necessary to deal with these affidavits in great detail. Suffice it to say, in the first affidavit of Mr.A.K.Singh, it is stated that as per the order of the Tribunal, the duty payable is Rs. 115, 11,52,349/- and after adjusting the amount of bank guarantee of Rs.50,00,00,000/- upon encashment, the balance duty payable by the petitioner is Rs.65,11,52,349. In his second affidavit Mr.A.K.Singh, has reiterated what he stated in his first affidavit and further stated that in its order, the Tribunal has not debarred the levy of duty after the importation of the rig in the year 1988 (including that of 1998). In his second affidavit, Mr.A.K.Singh seeks to convey that as per the order of the Tribunal the duty has to be calculated as if the last import was in the year 1998. In the third affidavit, Mr.G.S.Arekar stated that the Tribunal had permitted the 1988 valuation and, accordingly, the value of the rig in the year 1988 is valued at US$ 13 Million. On the basis of the said valuation, the department has now calculated the duty imposable and also calculated the drawback amount permissible to the petitioner. He, however, states that the duty calculated is in respect of six imports including the import made on 25.4.1998 but the same has been done at the permitted 1988 valuation (as the Supreme Court did not agree with the plea of

the department for 1998 valuation). In the fourth affidavit, Mr.G.S.Arekar stated that the demand of Rs.103,73,76,681/- claimed in Exhibit 2 to the affidavit dated 9.3.2001 was calculated on the basis of the valuation of the rig at US$ 49 million. The Tribunal directed the valuation of the rig at US$ 13 million and the demand has been recalculated on the basis of the Tribunal's order as stated in Exhibit 1 annexed to the affidavit dated 5.10.2005. In his affidavit, filed on 19th October, 2005, Mr.S.S.Bhadoria has admitted that upon dismissal of the appeals by the Supreme Court, the order of the Tribunal has attained finality and both the parties are required to follow the judgment of the Tribunal. According to him, as per the affidavit filed by Mr.G.S.Arekar on 10.10.2005, the demand of duty would be restricted to Rs.40.80 crores.

8. From the various affidavits filed on behalf of the customs department as referred to above, it is clear that the respondent No.2 has been construing the order of the Tribunal in its own manner. They worked out the value of the said rig as it existed in the year 1988 in its own manner and then worked out the duty as if there were imports after 1988 which continued upto 1998. It transpires that despite the fact that the department's claim of the valuation of the said rig at US$ 49 million failed before the Supreme Court, the respondent No.2 refuses to accept the valuation of the said rig at US$ 13 million as has been specified by the Tribunal in its order.

9. It is difficult to fathom the stance of respondent No.2. The order of the Tribunal having attained finality, the least expected of the respondent No.2 was to accept the order of the Tribunal gracefully and assess the duty in relation to the import of the said rig in the year 1988 having valuation of US$ 13 million. Obviously, the rate of duty applicable would be under section 15 (1)(c) of the Customs Act as prevailing on the date of payment of duty.

10. We shall briefly refer to the findings of the Tribunal as recorded in the order dated 2.2.1991 to avoid any further confusion in the mind of the respondent No.2. The show-cause notice charged the petitioner in addition to the import in 1988 with imports into the designated area upto the year 1998. When the matter reached the Tribunal, it sought to ascertain the current practice followed by the Customs authorities with regard to the documentation and the assessment required for rigs and craft plying between Mumbai and the designated area or between two designated areas, including supply vessel going to the rigs located in the designated area. On the basis of the letter dated 20th November, 2000 signed by the Deputy Commissioner of Customs that was produced the Tribunal recorded the practice being followed by the department thus-, “In case of oil rigs, once cleared as bill of entry for home consumption the department is not insisting on filing import or

export documents for movement to or from the designated area since they are no more imported goods." On the basis of this practice, the Tribunal recorded that the Commissioner's order of confiscation holding that for the import of the rig in 1998 into NV was not sustainable. Then in para 31, the Tribunal held thus-

> "31. The rig is liable to confiscation for the initial import made in 1988, for two reasons. The first is that no bill of entry was filed for its import. We have already rejected the argument that it was not goods for home consumption. The bill of entry which ought to have been filed for its clearance not having been filed, and since it was moved out of the Customs area without proper permission, it became liable to confiscation under clauses (h) and (j) of Section 111. It also becomes liable to confiscation under clauses (d) of that Section, as no licence was produced for its clearance."

11. The Tribunal discussed the matter further in paragraph 42 and held in respect of the value of the rig for the purposes of levy of duty thus-

> "42. That brings us to the next question, the value of the rig for purpose of levy of duty. The Commissioner has proceeded to value the rig on the basis that it was imported in 1998. On our view, that the confiscation of the rig has to be ordered in relation to its import in 1988, it is the value of the rig, at that time in 199, that was to be considered. That according to the appellant is US$ 13 million. By applying clause © of sub-section (1) of Section 15 the rate of duty applicable would be the date of payment of duty."

12. Since on behalf of the petitioner, it was argued before the Tribunal that the drawback of the duty was available under section 74 of the Act, the Tribunal in paragraph 48 held thus-

> "48. It was alternatively argued that drawback of the duty would be available under section 74 of the Act. There was no satisfactory answer to this argument by the Counsel for the department. We accept this argument in principle and direct that the duty liability be worked out after taking into account the drawback, if any, that the Appellant would be entitled, consequent upon the export of the rig after it was imported into India in 1988."

13. From a careful reading of paragraphs 31,42 and 48 of the order dated 2nd March, 2001 passed by the Tribunal, no doubt is left that the said rig was liable to confiscation for its import in 1988 as no bill of entry was produced by the petitioner. The said rig having been imported in 1988, it was no more imported goods thereafter and no documentation was required for further movements into the designated area. In so far as question of duty was concerned, it was the value of the Rig in 1988 which was to be adopted and that was considered as US$ 13 million. Obviously, the duty liability has to be worked out accordingly. Since the petitioner has now waived its claim of drawback, the direction given by the Tribunal in paragraph 48 to the extent that duty liability will be worked out after taking into account the draw back survives no more.

14. The result of the aforesaid discussion is that we may

dispose of this writ petition by the following order:-

(i) The letter (Exhibit `H') addressed by the respondent No.2 to the respondent No.3 is quashed and set aside.

(ii) The respondent No.2 shall assess the duty liability on the bill of entry as per the order of the Tribunal dated 2nd February, 2001 treating the import of the said Rig in the year 1988 having the value of US$ 13 million.

(iv) The facet and aspect of essentiality certificate being not the subject matter of writ petition, no order is passed by us in that regard. However, it will be open to the petitioner to claim its entitlement under the essentiality certificate before respondent No.2 and it is for the respondent No.2 to consider the said facet and aspect and pass an appropriate order in that regard.

(iv) Until the finalisation of assessment by the respondent No.2 and for a period of four weeks from the date of communication of the said order to the petitioner, the respondent No.2

shall not encash the bank guarantee. The petitioner shall keep the bank guarantee alive until the finalisation of assessment and for a period of four weeks thereafter from the date of communication of the order.

Order accordingly. No costs.

(R.M.LODHA, J.)

(J.P.DEVADHAR, J.)